UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES PUBLIC INTEREST RESEARCH GROUP, STEPHEN E. CRAWFORD, and CHARLES FITZGERALD,	)	
Plaintiffs	)	
v.	)	**CIVIL NO. 00-150-B-C**
HERITAGE SALMON, INC.,	)	
Defendant	)	

RECOMMENDED DECISION

The defendant, Heritage Salmon, Inc. ("Heritage"), operates several "salmon farms" in Cobscook Bay, which is located near the northeastern extreme of Maine's coastline. On July 31, 2000, the plaintiffs, the United States Public Interest Research Group, Stephen Crawford, and Charles Fitzgerald (collectively "USPIRG"), filed a Clean Water Act citizen suit against Heritage. They seek a declaratory judgment that Heritage "is in violation of an effluent standard or limitation under [Chapter 26 of Title 33 U.S.C.]"; an order enjoining Heritage from continuing to violate the applicable standard or limitation; and civil penalties. See 33 U.S.C. §§ 1311(a), 1319(d), 1365(a) & (f).

On May 23, 2001, USPIRG filed a motion for partial summary judgment on that portion of the complaint seeking a declaration that Heritage is in violation of the CWA. (Docket No. 9.) USPIRG wants the Court to declare that Heritage violates the CWA when it discharges the following things into—and out of—salmon pens located in Cobscook Bay: hatchery-bred salmon smolts; salmon feces and urine; parasites located on the salmon; fish feed; antibiotics

contained in the fish feed; cypermethrin (a chemical used to delouse farm salmon); copper (contained in a defoulant paint applied to Heritage's nets and pens); and miscellaneous articles of discarded equipment and refuse. (Plaintiffs' Motion for Summary Judgment, Docket No. 9, at 15-16.)

On June 22, 2001, Heritage submitted responsive filings and a cross motion for summary judgment. Heritage's motion for summary judgment asks the Court to dismiss the suit based on the plaintiffs' lack of standing or, alternatively, the doctrine of primary jurisdiction. (Docket No. 19.) In addition, Heritage filed a motion requesting that the Court abstain from exercising jurisdiction based on the Burford abstention doctrine (Docket No. 21) and a motion seeking a stay of adjudication on the merits of the complaint pending the resolution of the standing issue (Docket No. 22). On July 23, 2001, the Court endorsed the latter two motions, denying the motion for application of the Burford abstention doctrine but staying adjudication of the merits of the plaintiffs' complaint pending resolution of the standing question. The Court subsequently referred the standing question to me for my recommendation. After reviewing the parties' arguments and submissions, I now recommend that the Court **DENY** Heritage's motion for summary judgment insofar as it seeks a dismissal of the action based on the plaintiffs' lack of standing.

SUMMARY JUDGMENT AND STANDING

The degree of scrutiny a court brings to bear on a standing challenge differs according to whether the issue is being determined based solely on the pleadings or on a summary judgment record. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (observing that standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the

litigation"). In this case, Heritage attacks the plaintiffs' standing for the first time in its summary judgment motion. A summary judgment movant is entitled to a favorable summary judgment order only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). However, pursuant to Local Rule 56, the record is not an open book. Rather, the Court's consideration of record materials is limited by the parties' statements of material facts. D. Me. Loc. R. 56 ("The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts."). In practice, the summary judgment factual record consists solely of those factual statements offered by the parties in their statements of material facts that are both material to the dispute and supported by citation to the record.

BACKGROUND

The parties have filed two sets of factual statements. The first set was filed with respect to USPIRG's motion for summary judgment. These statements are found at docket numbers 10, 18, and 23. The second set was filed with respect to the Heritage motion now under consideration. These statements are found at docket numbers 20, 26, and 31. The facts presented in the second set focus narrowly on Heritage's pending national pollution discharge elimination system permit application and on the plaintiffs' standing-related averments. They do not include any factual representations concerning the nature of the pollutants discharged from Heritage's sites. Nor do they describe Heritage's operations. Nor do they indicate whether the individual plaintiffs or one Nancy Oden are members of USPIRG or what USPIRG's organizational purpose is. These matters are addressed in the first set of statements. Although

USPIRG cites to and argues from the record as though it were an open book, I address in this opinion only the material facts contained in these two sets of statements. Although the Rule 56 record is cumbersome because six sets of statements are cross-referenced, I am persuaded that in order to fairly consider the question of standing the statements should be read in tandem.

Before the parties' factual statements are presented, some legal context is in order. A CWA citizen suit against an alleged polluter must allege a violation of "an effluent standard or limitation" or an "order issued by the [EPA] or a state with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1). The alleged violation must be ongoing or intermittent for the plaintiff to state a claim. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 58-59 (1987). Section 1311(a) provides a statutory threshold standard that "the discharge of any pollutant by any person shall be unlawful." Section 1311(a) provides, too, that discharges made in compliance with certain other provisions of the CWA are not unlawful. Among these other provisions is section 1342. Pursuant to section 1342, the Administrator of the EPA or an authorized state may, in its discretion, issue a national pollutant discharge elimination system permit ("NPDES permit") to a person or industry seeking to discharge pollutants into the Nation's waters.[1] A NPDES permit serves to exempt a specific pollutant discharge from the general prohibition of section 1311(a), but the permit must establish standards or limits governing discharges of the pollutant. Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 582-83 (6th Cir. 1988). It is unlawful to discharge pollutants into the Nation's waters

[1] There are two types of NPDES permits: individual and general. Typically, EPA will promulgate a nationally uniform "effluent limitation" on the discharge of a particular pollutant and implement that limitation in the form of individual NPDES permits issued to entities discharging that pollutant. See 33 U.S.C. §§ 1311, 1342. Where EPA has not yet promulgated such an effluent limitation, however, it may regulate the discharge of pollutants by issuing a general NPDES permit that applies to a class of similar entities located in a particular geographical region.

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 552 n.10 (5th Cir. 1996).

without first obtaining a permit. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 489 (1987); Milwaukee v. Illinois, 451 U.S. 304, 310-11 (1981). A court may enjoin or penalize such discharges pursuant to 33 U.S.C. § 1365(a).[2] See, e.g., Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 560-62 (5th Cir. 1996) (affirming district court order enjoining all unpermitted discharges and assessing civil penalties). In this suit, USPIRG is suing Heritage not for violating an administrative standard, order, or NPDES permit, but for discharging pollutants into the Nation's waters without first obtaining a NPDES permit.

1. Heritage's salmon operation

Heritage owns and operates five salmon farms in Cobscook Bay known as South Bay, Broad Cove, Deep Cove, and Comstock Point I & II. (Heritage's Statement of Material Facts in Support of Its Motion for Summary Judgment, Docket No. 20, "DSMF-20", at ¶ 1; Plaintiffs' Local Rule 56(d) Responsive Statement of Material Facts, Docket No. 26, "RSMF-26", at ¶ 1.) Heritage operates a sixth salmon farm in Cobscook Bay called Birch Point, which is leased from another company. (Local Rule 56(a) Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment, Docket No. 10, "PSMF-10", at ¶ 3.) Heritage conducts a "brood stock program" at each of its farms. Through its brood stock program Heritage attempts to breed larger, faster-growing, and hardier salmon. (Id. at ¶ 8.) Heritage grows only one of two North American strains of salmon, although five of their pens currently hold approximately 100,000 salmon that are of a non-North American strain or species. (Id. at ¶ 11.) Heritage does not currently grow transgenic, or genetically modified or engineered, salmon. (Id. at ¶ 13.) The life of a Heritage salmon begins at a freshwater hatchery. As soon as the fish develop into smolts, they are transferred to one of the seawater farms in Cobscook Bay. Once there, they are

[2] Title 33 U.S.C. § 1365 provides, "The district court shall have jurisdiction . . . to enforce such an effluent standard or limitation, or such an order . . . and to apply any appropriate civil penalties under section 1319(d) of this title."

emptied from boxes or "flumed" down plastic tubes into pens, or cages, moored at the farms. (Id. at ¶¶ 18-19.) The salmon continue to grow in the pens for about 15 to 27 months before being harvested for the market. (Id. at ¶ 21.) In order to preserve the pens, Heritage treats them with an "antifoulant" paint, Flexguard II, which hinders the growth of marine organisms that would otherwise grow on the nets and gradually "foul" them. (Id. at ¶ 26.) Flexguard II contains copper, which "ultimately to some degree goes off in the marine environment." (Id. at ¶ 27.) Heritage feeds its salmon a fish feed that contains waste products from the chicken processing industry, including ground up chicken carcasses, feathers, and blood. (Id. at ¶ 28.) The feed also contains a "vitamin/mineral pack." (Id. at ¶ 29.) Because farm salmon are not fed crustaceans that wild salmon eat, their flesh does not turn pink unless a pigment is added to their food. (Id. at ¶ 30.) Heritage includes in the fish feed canthaxanthin, a pharmaceutical manufactured by Hoffman LaRoche, to artificially color their salmon. (Id. at ¶ 32.) Heritage feeds its fish by pouring, blowing, or hand delivering feed into the pens from barges. (Id. at ¶¶ 34-37.)

Because the stress put on farmed salmon from being grown in pens increases the incidence of disease, Heritage samples or checks its fish on a weekly and monthly basis. (Id. at ¶ 38.) Disease can spread among the salmon pens and farms through human contact and equipment. (Id. at ¶ 39.) Heritage uses vaccines to prevent disease and antibiotics to treat disease. (Id. at ¶¶ 42, 46.) One of Heritage's farms in Maine had fish that were infected with a virus called infectious salmon anemia. This disease has been found in other Maine farms and in Heritage's nearby Canadian salmon farms. It spreads through water, through contact with fish feces and urine, and, possibly, through parasites. (Id. at ¶¶ 54-56.) There is no cure for this disease and, according to various federal agencies, it presents a significant threat to wild salmon. (Id. at ¶ 57.) Another concern for Heritage is sea lice, parasites that can injure and kill salmon if

left untreated. (Id. at ¶¶ 58-59.) Heritage uses the chemical pesticide cypermethrin to kill sea lice. (Id. at ¶ 64.) Heritage places a tarp around a pen, raises it to confine the salmon, then injects cypermethrin into the tarped pens. (Id. at ¶ 66.) After about an hour, the tarp is removed and cypermethrin disperses into the marine environment. (Id. at ¶ 67.)

On occasion, salmon escape from their pens, sometimes in large number. (Id. at ¶¶ 74, 78, 82.) The EPA, the National Marine Fisheries Service, and the U.S. Fish and Wildlife Service have determined that salmon farm escapees can interbreed with native salmon and cause genetic dilution, compete for forage and habitat, disrupt native salmon egg nests, and spread disease. (Id. at ¶ 84.) In addition, accumulation of salmon feed and feces on the ocean floor can cause the ocean floor to become anoxic, or devoid of oxygen, which leads to the proliferation of a bacteria called beggiatoa. (Id. at ¶¶ 91-92.)

The North Atlantic Salmon is listed on the federal endangered species list. (Id. at ¶ 6.) Commercial scalloping and lobstering are conducted near Heritage's pens. (Id. at ¶ 52.) Heritage does not have a NPDES permit for any of its salmon farms. (Id. at ¶ 100.) There is no general NPDES permit that covers the salmon farming industry in Maine. (Id. at ¶ 101.)

2. The NPDES permit application

According to the EPA, for a number of years it did not issue NPDES permits to businesses working in salmon aquaculture

> because the information available at the time indicated that such permits were not a significant environmental concern. At the time that these permit applications were filed they were considered low-priority permits because the environmental issues related to fish farms in Maine, including potential problems with the use of non-North American strains of Atlantic salmon, were not well understood.

(DSMF-20 at ¶ 6; RSMF-26 at ¶ 6.) Between the date on which USPIRG filed its notice of intent to sue and the date on which it filed the complaint, Heritage applied for a NPDES permit

for each of its sites. (Id. at ¶ 4.) Subsequently, the EPA delegated permitting authority to the State of Maine. (Id. at ¶ 8.) According to Heritage, the State has committed to issuing draft individual or general permits for salmon farms by November 2001. (Id.) The EPA retains oversight authority with regard to the issuance of permits. (Id.) The EPA has indicated that the following standards should govern the issuance of permits: fish escapes should be limited; measures must be imposed to limit the impact of escapes on the wild Atlantic Salmon population; transgenic fish and reproductively viable non-"North American Atlantic Salmon" stocks are banned; salmon cages or pens must be designed to achieve zero escapes in any Maine river; loss control plans must be in place; all fish must be marked. (Id. at ¶¶ 2-3.)

3. Plaintiffs' averments of injury

The standing issue is germane to each plaintiff and hinges in part on each plaintiff's individual averments of particularized injury, except for USPIRG, which depends on a showing of injury to one of its members. USPIRG's statement of material facts identifies Stephen Crawford, Charles Fitzgerald, and Nancy Oden as members of USPIRG. (PSMF-10 at ¶ 138.) It also describes USPIRG as an organization dedicated to environmental protection. (Id. at ¶ 139.) Crawford, Fitzgerald, and Oden consider Heritage's operations to be injurious to the environment and to their personal interests.

a. Stephen Crawford

> Stephen Crawford does not live on Cobscook Bay, but on the adjeacent Passamaquoddy Bay, approximately seven miles from the nearest Heritage site. (DSMF-20 at ¶ 14.) Crawford has conducted commercial operations in Cobscook Bay (Id. at ¶ 11), currently conducts daily research on marine life in the Bay (PSMF-10 at ¶ 119), and fishes and boats there recreationally (DSMF-20 at ¶ 18). Crawford has an interest in preserving the natural environment in the eastern part of Maine. (PSMF-10 at ¶ 118.) Crawford avers that he eats less shellfish from Cobscook Bay now than he did in the past, in part due to his concern over bacteria that he believes are produced in the Heritage salmon pens and that he eats less mackerel than he would like to because of his concern over potential

contamination from antibiotic-laden food that washes from the salmon pens. (RSMF-26 at ¶ 15.) Crawford describes his diet as being, for the most part, vegetarian. He eats meat, fish, and shellfish only occasionally and "by and large" excludes them from his diet. (DSMF-20 at ¶ 17.)

Crawford also believes that Heritage's operations pose a great risk to endangered Atlantic Salmon because farm fish (a different strain or species) escape and interbreed with the wild population and because the development of more virulent bacteria strains in the salmon pens may have the potential to injure the wild population. Crawford avers that the destruction of the native Atlantic Salmon population would be an "irreplaceable loss for [him] personally." (RSMF-26 at ¶ 17.)

Crawford also expressed generalized environmental concern over a number of Heritage's byproducts of operation, including cypermethrin. Crawford believes that cypermethrin kills crustaceans, like lobster and shrimp. (Id.)

b. Charles Fitzgerald

Charles Fitzgerald lives in Atkinson, Maine, an inland town that is some distance from any of Heritage's sites. (DSMF-20 at ¶ 20.) He also owns 1000 acres in Washington County along the Machias River. This property is closer to Heritage's sites, but it is not located in Cobscook Bay. (Id.) Fitzgerald states that he is participating in this litigation "because the activities of Heritage Salmon's salmon farms greatly increases the risk that the wild Atlantic Salmon that live in the Dennys River and other rivers in Downeast Maine where I . . . used to enjoy fishing . . . will be driven to extinction." (Id. at ¶ 30.) Fitzgerald also complains that the decrease in the wild Atlantic Salmon population has caused a decrease in the number of fishermen who recreate in the area and that this has caused the value of his Washington County property to decrease as well. (Id. at ¶ 25.)

In addition to complaining of the inability to fish for wild salmon, Fitzgerald also complains of being unable to eat "wild Maine salmon." (Id. at ¶ 21.) He has not fished for salmon for seven or eight years because he does "not want to be a party to endangering the few wild salmon that are left." (RSMF-26 at ¶ 21; SMF 20 at ¶ 27.) Fitzgerald is also concerned about "residues" of cypermethrin in lobsters and the accumulation of Heritage's antibiotics and pesticides in local fish he might eat. (RSMF-26 at ¶¶ 29-30.) Fitzgerald states that he will no longer eat lobster from Cobscook Bay because of Heritage's operations. (Id. at ¶ 29.) According to Fitzgerald, Heritage has had an adverse impact on his "enjoyment of Maine's coastal waters and the culture of Downeast Maine." (DSMF-20 at ¶ 32.)

c. Nancy Oden

Nancy Oden lives in Jonesboro, approximately 31 miles from Cobscook Bay. (Id. at ¶ 34.) She also owns rental properties on the Machias River and St. Croix River. (Id.) Oden has not recreated on or in the waters of Cobscook Bay for many years. (Id. at ¶¶ 35-36.) Oden attests that she will no longer eat lobsters or fish from Cobscook Bay due, in part, to the presence of salmon farms and her

concern over their discharge of antibiotics, cypermethrin, artificial pigment, and other wastes that lobsters near the pens might be consuming. (RSMF-26 at ¶ 43.) Oden states that but for this pollution she "would love to" harvest and consume lobsters from the Bay. (Id.) Oden attests that she charges reduced rent on her St. Croix River and Machias River properties due to the current lack of healthy salmon runs. (DSMF-20 at ¶ 39.)

DISCUSSION

Heritage moves for summary judgment on the ground that the plaintiffs lack standing to bring a citizen suit. Heritage contends that the plaintiffs have failed to carry their burden of showing injury-in-fact or that their alleged injuries could be redressed by the Court in the context of this action. (Motion for Summary Judgment of Defendant Heritage Salmon, Docket No. 19, at 5-16, 16-17.)

The question of standing goes directly to the question of a court's power to decide a given "case or controversy." Lujan, 504 U.S. at 560 ("[S]tanding is an essential and unchanging part of the case or controversy requirement of Article III."). For this reason, the issue of standing is a threshold matter that federal courts must address before considering the merits of the parties' claims. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) (5-4). When a plaintiff is an association asserting rights on behalf on its members: (a) some members must have standing to sue in their own right; (b) the members' interest in the suit must be germane to the organization's purpose; and (c) the claim asserted and the relief requested must not require the individual participation of those members in the suit. See Int'l Union, UAW v. Brock, 477 U.S. 274, 282 (1986). Heritage does not contend that USPIRG would fail to meet this standard assuming that element (a) is otherwise satisfied by the named members of the organization.

The party invoking federal jurisdiction bears the burden of demonstrating the following three standing prerequisites:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (internal quotation marks, brackets, and citations omitted). This test constitutes the "irreducible constitutional minimum" of standing. Id. at 560.

Although a plaintiff may successfully meet all of the Article III standing requirements, a court may yet decline to exercise jurisdiction based on certain prudential considerations, such as that a plaintiff's injury should arise from his or her own rights and not the rights of third-parties, Miller v. Albright, 523 U.S. 420, 445 (1998); that "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit," Bennett v. Spear, 520 U.S. 154, 162 (1997); that the plaintiff's injury must be more than a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens," Warth v. Seldin, 422 U.S. 490, 499 (1975). "Congress legislates against the background of [the Supreme Court's] prudential standing doctrine, which applies unless it is expressly negated." Bennett, 520 U.S. at 163 (holding that the "citizen suit" provision in the Endangered Species Act negates the "zone of interest" prudential doctrine).[3]

1. Article III considerations related to standing

Heritage's primary attack focuses on the injury requirement. (Motion for Summary Judgment of Defendant Heritage Salmon, Docket No. 19, "DMSJ" at 5-16.) Heritage argues that the plaintiffs have not demonstrated any use of Cobscook Bay that might be injured by

[3] At least one federal court has held that "[i]n cases alleging CWA violations . . . Congress has superseded any prudential limitations by broadly conferring standing to sue on 'any citizen.'" Dubois v. United States Dep't of Agric., 20 F. Supp. 2d 263, 266 (D.N.H. 1998) (citing 33 U.S.C.A. § 1365(a)).

Heritage's operations. (Id. at 5.) Heritage otherwise contends that, if the plaintiffs are suffering cognizable injuries, the instant lawsuit and the requested remedies cannot adequately redress them. (Id. at 16-17.)

a. "Injury in fact"

The Article III injury requirement addresses injury to the plaintiff, not injury to the environment. Friends of the Earth v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 181 (2000). A plaintiff is not required to show an economic injury to garner standing to bring an environmental citizen's suit, though economic injury will certainly suffice. Id. at 183-84. "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.'" Id. at 183 (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). Thus, for example, past recreational use of an area followed by a discontinuation of use out of concern over the harmful effects of the challenged activity will suffice to set forth a particularized injury-in-fact. Id. at 181-84. An intended use in the absence of past use will also suffice, Laidlaw, 528 U.S. at 182 (discussing averments of plaintiffs Judy Pruitt and Linda Moore), but while the intent to use an object of environmental concern may be conditional on the discontinuance of a challenged activity, a plaintiff must have a sufficiently meaningful intention of use, something more than a "some day" intention, and the object of concern cannot be so remote or far-flung that a finding of a particularized injury becomes meaningless. Lujan, 504 U.S. at 564 (denying standing to plaintiff having "'some day' intentions" to visit endangered species halfway around the world); see also Lujan v. Nat'l Wildlife Fed., 497 U.S. 871, 889 (1990) (denying standing where plaintiff organization offered only that one of its members "uses unspecified portions of an immense tract of territory, on some portions of which mining activity

has occurred or probably will occur"). Finally, it cannot be "improbable" that the challenged activity might cause the plaintiff harm. Laidlaw, 528 U.S. at 184 (discussing Los Angeles v. Lyons, 461 U.S. 95, 107-108 & nn.7, 8 (1983)).

In my view, Crawford, Fitzgerald, and Oden all provide sufficient averments to satisfy the "injury in fact" requirement. With regard to "use" of Cobscook Bay, they all describe how concern over discharges from Heritage's operations has caused them to reduce the amount of Cobscook Bay fish and/or shellfish they consume.[4] Although Oden makes plain that she currently has no intention of consuming fish or shellfish from the area, she also attests that she "would love to" harvest fish and shellfish from Cobscook Bay if it were not for Heritage's discharges into the Bay. These averments indicate that Crawford, Fitzgerald, and Oden do not take advantage of a local food source that they would otherwise enjoy due, in large measure, to Heritage's discharges.

With regard to the alleged, generalized threat that Heritage's operations pose to the endangered native salmon species and, by extension, to Crawford, Fitzgerald, and Oden's personal interests, Crawford and Fitzgerald, at least, provide sufficient averments to tie salmon endangerment to their particularized interests. As a person interested in preserving the natural environment in the area who also conducts daily research on certain marine life in Cobscook Bay, Crawford's averment that he would suffer an aesthetic loss from destruction of the native salmon species is not "improbable." Certainly the nature of Crawford's interest in marine health within Cobscook Bay is no less substantial than the interest of the recreational boaters and nature walkers in Laidlaw. 528 U.S. at 182-83. As a recreational fisherman, Fitzgerald, too, has a particularized interest in the native salmon that is harmed by Heritage's discharges. To the

[4] To the extent that Crawford and Fitzgerald's averments indicate that they still eat, although at a diminished level, some amount of fish or shellfish from Cobscook Bay, additional averments tend to support their concern over the level of harmful contamination that may exist in such food as a consequence of Heritage's operations.

extent that such recreational activity may take place more on the Dennys River, a tributary of Cobscook Bay, as opposed to Cobscook Bay itself, I think that Heritage makes too much of the argument that "use" relates only to direct recreational or economic use of water or organisms existing within the geographic limits of the Bay. First, wild salmon are not confined to narrowly confined bodies of water. Second, the evidentiary offerings made by the plaintiffs sufficiently describe how the nature of Heritage's operations poses certain risks of genetic dilution and disease for the native salmon. In the aggregate, these averments provide sufficient information for the Court to conclude that Heritage's discharges into the Nation's waters directly affect Fitzgerald's recreational interest. Laidlaw, 528 U.S. at 183-84 ("[T]he affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests.").[5]

b. "Fairly Traceable"

Although Heritage does not argue "traceability" as a discrete factor of its standing analysis, it is clearly the plaintiffs' burden to establish some causal connection between the injury complained of and the challenged actions of the defendant. First, because Heritage does not have a permit for its discharges, any discharge exceeds that which is allowed under the CWA. Assuming for purposes of the standing analysis only that the release of genetically different and potentially diseased salmon is a prohibited discharge, injuries related to the prolongation of native salmon endangerment or their further decline is clearly traceable to Heritage's operations. The standard is whether the "pollutant" causes or *contributes* to the kinds of injuries alleged by plaintiffs. PIRG of New Jersey, Inc. v. Powell Duffryn, 913 F.2d 71, 72

[5] Because these averments are sufficient to carry the plaintiffs forward, there is no need to address Fitzgerald and Oden's attestations of economic injury relating to properties located on rivers even more remote than the Dennys.

(3rd Cir. 1990). Heritage cannot defeat the plaintiffs' claims of standing simply by arguing that other causative agents may be operating to bring about the decline of wild salmon stocks.[6] The same principle applies to the alleged pollution of the shellfish and other wild food stocks in the bay. Heritage discharges chemical substances into the waters without a permit. Thus, the plaintiffs' concerns about the consumption of shellfish and other food from Cobscook Bay as a result of those discharges are fairly traceable to defendants' conduct.

c. "Redressability"

With respect to redressability, the plaintiffs' attestations must reveal a "substantial likelihood" that the requested relief will remedy the alleged injury. Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000). An order enjoining unlicensed discharges from Heritage's operations and/or penalizing Heritage for ongoing violation of the CWA would provide a meaningful remedy for the injuries attested to by Crawford, Fitzgerald, and Oden. Laidlaw, 528 U.S. at 185-86 ("It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress.").

2. Prudential considerations related to standing

Heritage references the doctrine of "prudential standing" in its memorandum. (DMSJ at 4.) However, it does not present any particularized argumentation on this score. Given the broad conferral of standing in the "citizen suit" provision of the CWA, it is perhaps as well that Heritage does not belabor the issue. It is not evident to me that entertaining this suit would insert

[6] Proof of injury to the environment is not required for substantive liability under the CWA. Laidlaw, 528 U.S. at 181 (observing that Article III standing test does not require showing of environmental injury in CWA citizen suit because such a requirement would "raise the standing hurdle higher than the necessary showing for success on the merits").

this Court into a dispute that Congress did not expressly authorize it to adjudicate. Nor is it accurate to suggest that Crawford, Fitzgerald, and USPIRG are not within the zone of interest created by the CWA's citizen suit provision. And though some of Crawford, Fitzgerald, and Oden's professed injuries describe nothing more than generalized environmental grievances, those attestations related to the loss or contamination of a localized food source and the recreational and aesthetic injuries attendant to the further decline or extended endangerment of the native salmon population do present particularized injuries that can be redressed through injunctive relief and the imposition of penalties.

CONCLUSION

Crawford, Fitzgerald, and Oden all provide sufficient averments of a particularized injury in fact that can be fairly attributed to Heritage's discharges and redressed by the judicial remedies they seek. Accordingly, I recommend that the Court **DENY** Heritage's motion for summary judgment insofar as it seeks dismissal of the suit based on the plaintiffs' lack of standing.[7]

[7] The Court's referral did not encompass the issue of whether the doctrine of primary jurisdiction would warrant staying (or dismissing) these proceedings pending completion of the NPDES permitting process. Therefore, I have not addressed it in the body of this decision. I would note, however, that although the parties' submissions suggest that this suit presents an opportunity for the Court to act as a "judicial permitting authority," they do not provide any precedent or statutory authority for the proposition. In the context of this case, section 1365 provides only that the Court may exercise its jurisdiction to enforce *existing* standards or limitations and apply appropriate civil penalties. It does not appear to authorize the Court to issue its own standards and limitations or to serve as a judicial permitting authority. Cf. Mumford Cove Ass'n, Inc. v. Groton, 640 F. Supp. 392, 395 (D. Conn. 1986) ("Any requirement that a court determine whether a particular permit violation is merely 'technical' or whether a particular effluent limitation is necessary to control pollution would be inconsistent with the [c]ongressional intent to preclude 'reanalysis of technological [or] other considerations at the enforcement stage.'") (quoting Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 414, 92d Cong., 1st Sess. *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3745). Rather, because this case concerns discharges of pollutants in the absence of a NPDES permit, the existing standard is provided in Section 1311(a). In other words, the "merits" of this case simply address whether the discharges from Heritage's operation are pollutants within the meaning of the CWA. This determination is essentially a legal one that courts may resolve at the summary judgment stage. See, e.g., Cedar Point, 73 F.3d at 550 (affirming district court's entry of summary judgment on substantive liability under the CWA); Cmty. Ass'n for Restoration of the Env't v. Sid Koopman Dairy, 54 F. Supp. 2d 976, 981 (E.D. Wash. 1999) (granting summary judgment in favor of plaintiffs on issue of whether defendant dairy operations were point sources that must comply with the NPDES permit requirement); Waste Action Project v. Clark County, 45 F. Supp. 2d 1049, 1055 (W.D. Wash. 1999) (granting summary judgment in favor of plaintiffs on issue of whether municipality

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten days of being served with a copy thereof. A responsive memorandum shall be filed within ten days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: August 28, 2001

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Margaret J. Kravchuk
U.S. Magistrate Judge

STAY BANGOR

STNDRD

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-150

U S PUBLIC INTEREST, et al v. HERITAGE SALMON INC Filed: 07/31/00

Assigned to: JUDGE GENE CARTER

Demand: $0,000 Nature of Suit: 893

Lead Docket: None Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 33:1319 Clean Water Act

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was liable for discharging pollutants without a NPDES permit); cf. Mumford, 640 F. Supp. at 396 (observing that polluters are strictly liable for violations of discharge standards or limitations and fault or intent are only relevant with respect to the appropriate remedy); United States v. Gulf Park Water Co., 972 F. Supp. 1056, 1060-61 (S.D. Miss. 1997) (granting summary judgment in favor of plaintiff on substantive liability issue and observing that "Congress intended to make issues that could be technically complicated easier to enforce by limiting the factual issues so that 'the factual basis for enforcement of requirements would be available at the time enforcement is sought, and the issue before the court would be a factual one of whether there had been a compliance'") (quoting United States v. CPS Chemical Co., Inc., 779 F. Supp. 437, 442 (E.D. Ark. 1991)); Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 451-52 (D. Md. 1985) (same).

Given the nature of the Court's enforcement task, it would not appear that the doctrine of primary jurisdiction is applicable to this case. There is no agency enforcement action being taken, there is no highly technical factual matter for the Court to refer to the agency, and the statutory scheme clearly envisions citizen enforcement actions against those who pollute without a permit. However, the pendency of the state's permitting process may be a consideration for the court in assessing a civil penalty and/or fashioning injunctive relief. Notably, the Court is not required to issue an injunction ordering that all pollution cease. Courts may craft injunctive relief in the face of ongoing agency action that allows pollution to continue for a limited period. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) ("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."); see also id. at 320; Laidlaw, 528 U.S. 192-93.

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